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STATUTES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 85

MANUEL S. MADRUGA, *Petitioner*

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN DIEGO

BRIEF ON BEHALF OF THE RESPONDENT COURT

OPINION OF COURT BELOW

The opinion below, *Madruga v. Superior Court of the State of California, in and for the County of San Diego*, 40 A.C. 65, 251 P. 2d 1 (1952), appears in the record at p. 29.

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court arises under Title 28, U.S.C., Section 1257(3).

THE FEDERAL STATUTE INVOLVED

The questions presented by this case arise under Title 28, United States Code, section 1333, the pertinent portion of which reads:

> "The District Court shall have original jurisdiction, exclusive of the courts of the states, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[1]

STATEMENT OF THE CASE

The Supreme Court of California (R. 29) accurately summarized the facts in this case as follows:

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[1] From 1789 to 1948 the saving clause read:

> ". . . saving to suitors the right of a common-law remedy where the common law is competent to give it." (Tit. 28, U.S.C., sec. 41 (3), 371 (3), 1940 ed.)

The 1948 revision of the Judicial Code (Act of June 25, 1948, 62 Stat. 931) amended this clause to read:

> ". . . saving to the libellant or petitioner in every case any other remedy to which he is otherwise entitled."

By the Act of May 24, 1949, 63 Stat. 101, the clause was amended to its present form.

The 1948 amendment was explained by the Reviser's Note (28 U.S.C., page 1887):

> "The substituted language is simpler and more expressive of the original intent of Congress and is in conformity with rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity . . . words 'libellant or petitioner' were substituted for 'suitors' to describe moving parties in admiralty cases."

The 1949 amendment was explained by the report of the House Committee on the Judiciary (H. Rept. No. 352, 81st Cong., 1st Sess., on H.R. 3762), as follows (p. 14):

> "This section amends section 1333 (a)(1) of title 28, U.S.C., by substituting 'suitors' for 'libellant or petitioner' to conform to the language of the law in existence at the time of the enactment of the revision of title 28."

"Co-owners representing eighty-five per cent of the interest in the Oil Screw Vessel Liberty, Official No. 256,332, docked at the City of San Diego, filed in the superior court in San Diego County a complaint for partition by sale of the vessel and distribution of the proceeds to all the co-owners. Manuel S. Madruga, the owner of the remaining fifteen per cent interest, named as defendant in the complaint, filed a demurrer stating among other grounds that the superior court had no jurisdiction of the subject matter and that exclusive jurisdiction was in the federal court. The respondent court overruled the demurrer and announced that it would proceed by requiring the defendant to answer the complaint. Thereupon the minority owner and defendant in the partition proceeding applied for the writ of prohibition directing the respondent court to refrain from further proceedings. The alternative writ issued. The jurisdictional question is submitted on the petition and the demurrer thereto.

"The action in the respondent court is one for partition by sale of the vessel as personal property and for distribution of the proceeds to the several co-owners in accordance with their stated individual interests, pursuant to sections 752a et seq. of the Code of Civil Procedure. It is alleged that there are no liens or encumbrances against the vessel. Partnership and accounting problems are not involved."

Section 752(a) of the California Code of Civil Procedure reads, in part, as follows:

"Where several persons are co-owners of any personal property, an action may be brought by any one or more such co-owners for a partition thereof; or in case partition cannot be had without great prejudice to the owners, for the sale thereof, and partition of the proceeds according to the respective interests of the parties. In all such actions the provisions of this chapter shall govern whenever applicable. Real and personal property may be partitioned in the same action."

Personal jurisdiction over the defendant (petitioner) was obtained by summons (R. 13) and appearance (R. 2).

The record does not evidence any attachment of the vessel.

The Supreme Court of the State of California held (R. 33):

> "... the state court is competent to decree ownership interests, sale of a vessel, and distribution of the proceeds, at least where the granting of the relief does not conflict with the federal maritime policy that the majority owners determine the use and employment of the vessel. Therefore the respondent court has power to proceed on the petition of the majority owners here.
>
> "The peremptory writ is denied and the alternative writ is discharged."

Certiorari was granted, and the case is now before this Court to review the decision of the Supreme Court of the State of California.

THE QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the admiralty jurisdiction of the district court extends to a partition action.

2. Is an action for partition of the ownership interests in a vessel an action *in rem* and hence within the exclusive admiralty jurisdiction of the federal court under Title 28, U.S.C. sec. 1333, or

3. Do state courts have concurrent jurisdiction with federal courts under the "saving clause" of Tit. 28, U.S.C. sec. 1333, to entertain a partition action instituted by a majority of the vessel's co-owners, if there is available an existing remedy by state statute and the granting of relief thereunder will not conflict with the federal maritime policy that the majority owners determine the use and employment of vessel?

SUMMARY OF ARGUMENT

I. An action for the partition by sale of a vessel, where the owners have unequal interests, is not necessarily "a civil case of admiralty or maritime jurisdiction." The admiralty jurisdiction of such cases is uncertain.

II. If the admiralty court has jurisdiction over a partition action in the circumstances of the case at bar, such jurisdiction is not exclusive, and the jurisdiction of the State courts is concurrent.

A. The jurisdiction of admiralty is exclusive only with respect to actions *in rem* to enforce maritime liens, and does not exclude the jurisdiction of state courts over actions *in personam* and *quasi in rem*.

B. An action for partition is not *in rem* in the admiralty sense. It is *in personam* and *quasi in rem*, within the concurrent jurisdiction of the State courts.

C. The partition statute of California has been construed and applied by the Supreme Court of California in the case at bar in conformity with the foregoing principles.

III. The application of the California partition statute by the courts of that State, in the circumstances of the case at bar, will not interfere with the proper uniformity of the maritime law.

ARGUMENT

I.

AN ACTION FOR THE PARTITION BY SALE OF A VESSEL, WHERE THE OWNERS HOLD UNEQUAL INTERESTS, IS NOT NECESSARILY "A CIVIL CASE OF ADMIRALTY OR MARITIME JURISDICTION." THE ADMIRALTY JURISDICTION OF SUCH CASES IS UNCERTAIN.

Cases exhibit disagreement as to whether an action for partition by sale of a vessel, among owners representing unequal shares, is a "case of admiralty and maritime jurisdiction" within the meaning of the grant of jurisdiction to the Federal Government in Article III, Sec. 2 of the Constitution.

Jurisdiction has been taken and relief granted, in admiralty, where sale has been sought by owners of a one-

half interest in the vessel. *The Emma B*, 140 F. 771 (D.C. N. J. 1906); *The John E. Mulford*, 18 F. 455 (S.D. N. Y. 1883); *Cooper v. Cooley*, 8 F. 636 (D. C. Ore. 1881); *Tucci v. Arbuckle*, 47 F. 2d 606 (S. D. N. Y. 1931); *The Ellenora*, 252 F. 209 (W. D. Wash. 1918); *Skrine v. The Hope*, 22 Fed. Cas. 305, No. 12,927 (S. D. S. C. 1793); *Davis v. The Brig Seneca*, 7 Fed. Cas. 1061, No. 12,670 (C. C. Pa. 1823)

No such unanimity is found with respect to a similar action urged by holders of unequal, and in particular, minority shares.

In *The Steamboat Orleans v. Phoebus*, 11 Pet. 175 (U. S. 1837), which concerned a libel in admiralty filed by a dissatisfied one-sixth owner of the vessel asking a sale and accounting, Mr. Justice Story remarked (at p. 183):

> "... The jurisdiction of courts of admiralty in cases of part owners, having unequal interests and shares, is not, and never has been applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called"

This statement has been quoted in Federal Courts as meaning that admiralty simply does not have jurisdiction of an action for partition by sale where unequal ownerships are involved: *Lewis v. Kinney*, 15 Fed. Cas. 484, No. 8,325 (E. D. Mo. 1879), where a one-third owner sought a sale in admiralty; *The Ocean Belle*, 18 Fed. Cas. 524, No. 10, 402 (S. D. N. Y. 1872), where owners of five-sixteenths sought a sale in admiralty; *The Red Wing* 10 F. 2d 389 (S. D. Cal. 1925), where a holder of an unstated interest, but apparently a minority, sought relief in admiralty; *Kellum et al. v. Emerson*, 14 Fed. Cas. 263, No. 7,669 (C. C. Mass. 1854), where a one-fourth owner sought recognition of equitable title, sale and accounting, in admiralty. If this interpretation be correct, and admiralty has no jurisdiction, then plainly the state courts are not deprived of jurisdiction of

such actions, without reference to the clause of title 28, U. S. C. § 1333 which saves to suitors in connection with maritime matters "in all cases all other remedies to which they are otherwise entitled."

Mr. Justice Story's statement, however, has been cited as well by a Federal Court for the proposition that admiralty has jurisdiction but will not exercise it in deference to the rule that the majority must control the use of the vessel: *Tunno et al.* v. *The Betsino*, 24 Fed. Cas. 316, No. 14,236 (D. C. S. C. 1857) where minority holders (extent of minority interest not stated) sought a sale in admiralty.

In all of the cases above cited it may be noted that the party petitioning for sale represented a *minority* interest. In *Willings* v. *Blight*, 30 Fed. Cas. 50, No. 17,765 (D. C. Pa. 1800), the moving parties represented a three-fourths interest in a vessel. They asked that Blight show cause why he should not permit the vessel to make a voyage upon the granting by them of proper security for the safe return of the ship.[1] At the time of the court's decision a stipulation had been entered into in which the majority owners gave Blight both security and a share of any proceeds. The court, though not interfering with the stipulation, expressed the opinion that the majority were obliged to give only security and not a share in the proceeds. The court intimated that minority dissenters who hold up a vessel in commerce should be compelled to sell. In stating that this question had not been judicially determined in the United States, the court conceded that "the authorities in the British books lead to the opposite conclusion and leave the

[1] This matter of security for safe return was given an interesting variation in *The Olga*, 254 F. 439 (E. D. N. Y. 1918). A one-fourth owner was ordered given bond by majority owners to insure that he would receive his portion of the proceeds of a sale of the vessel which the majority were entering into. The court could find no precedent but assumed the action proper, analogizing to bonds given by majority holders for safe return, in order to protect the minority. Admiralty Rule 19, 28 U.S.C. covers actions for security for safe return.

subject liable to controversy". This action represents the only one discovered by us, in a Federal court, in which the moving parties represented a majority interest.

The courts of several states have been moved to grant partition by sale of a vessel by both majority and minority interests but as far as can be determined, not by equal owners. All seem to have been aware of Mr. Justice Story's statement in *The Steamboat Orleans* and have, with the exception of the Supreme Court of Washington (*Cline* v. *Price*, 39 Wash. 2d 816, 239 P. 2d 322 (1951)), and, earlier, the Supreme Court of California (*Fischer* v. *Carey*, 173 Cal. 185, 159 P. 577, 1917A LRA 1100 (1916)), taken jurisdiction and granted relief both to minority as well as to majority holders. Thus in New York (*Andrews* v. *Betts*, 15 N. Y. (8 Hun) 322, (1876)—suit by a holder of an unreported interest), the court held that even assuming admiralty has jurisdiction, and seeing no reason why it should not, it is not exclusive by reason of the "remedies saved to suitors at common law." In Wisconsin (*Reynolds* v. *Nielsen*, 116 Wis. 483, 93 N. W. 455, 96 Am. St. Rep. 1000 (1903)—suit by a holder of a one-third interest), the court reasoned as in *Andrews* v. *Betts*, supra, as to the federal forum not being exclusive, but deemed a partition action to be outside admiralty's purview.

In Minnesota (*Swain* v. *Knapp*, 32 Minn. 429, 21 N. W. 414 (1884)—suit by a holder of a minority interest), the court reasoned that it had jurisdiction since the admiralty does not have or has refused jurisdiction. The court recognized a sale and accounting to be an equity rather than a common-law remedy, but considered the refusal of admiralty to take such cases to leave them to the states.

Louisiana (*State* v. *Watts*, 7 La. 440, 26 Am. Dec. 507 (1834)—suit by a holder of one-fourth interest) has ruled that state courts have a right to decree sale of a ship as a necessary incident to an accounting and partition of the interests, such jurisdiction being saved by the reservation in the Judiciary Act of all common-law remedies, further,

that if admiralty should take such a case (referring to *Shrine* v. *The Hope*, *supra*) it does not have the jurisdiction exclusively. And in Pennsylvania (*Cousin's Appeal*, 79 Pa. St. 220 (1876)) the court held the part owner of a steamboat entitled to insist upon a fair sale, under the order of a court of equity, although the others had already sold to a party who was dismantling the boat.

Washington (*Cline* v. *Price*, *supra*—a suit by owners of three-sevenths of the vessel) considered a suit for partition to be a proceeding *in rem* and concluded that jurisdiction *in rem* is exclusively in admiralty, thus ousting state courts of jurisdiction. This case has been criticized: 27 *Wash. L. Rev.* 176, 187 (1952).

California first held (*Fischer* v. *Carey*, *supra*—a suit by minority owners) that admiralty had jurisdiction unto itself although it may have withheld action because all of the cases before it had been at the instance of minority owners, whereas the majority must rule in the interests of commerce. The court found confusion as to admiralty's jurisdiction likely to have stemmed from the struggle in Britain between admiralty and common law courts with admiralty being powerless to decree a sale (*Ousten* v. *Hebden*, 1 Wils. 101, cited in Abbott on Shipping (7th Am. Ed. 1854) at p. 135) until this was remedied by the Admiralty Court Act of 1861 (24 Vict. c. 10). The court appears to have leaned heavily on the principle of majority rule, citing the following from *Tunno* v. *The Betsina*, (supra, at p. 321):

> "Of what use would be the principle which affirms the control resulting to a majority from the fact of its being so, if in any case in which it was to be applied, a court would be asked to decree a sale? It would soon be that the only mode for preventing a dissolution would be for the majority to render unquestioning accord to the wishes of the minority, no matter how small that minority, or unreasonable its exactions."

The court rejected the action of the minority holder, as not within its cognisance.

In the case now before this court, the California court was presented an action under statutes of the State for a partition by sale at the instance of majority owners, constituting an 85 per cent ownership of the vessel. Petitioner (defendant) here, owner of the remaining 15 per cent interest could not, under the authorities above cited, maintain a suit in admiralty to *compel* a sale; but his position seems to be that he has some substantive right to be heard in admiralty to *prevent* a sale by the majority. The court did not depart from its holding in *Fischer* v. *Carey* that admiralty has jurisdiction, but did find that this constituted no bar, in the light of the amended saving clause (28 U. S. C. A. § 1333), to concurrent jurisdiction of such actions in the States "*at least where the granting of the relief does not conflict with the federal maritime policy that the majority owners determine the use and employment of the vessel.*" (Emphasis supplied.) (Opinion, R. 32-33)

The California court thereby swung full circle on the appealing quotation from *Tunno* v. *The Betsina*. It would apparently not extend its processes to minority holders, thus sustaining this portion of *Fischer* v. *Carey*, but would not deny it processes to majority holders desiring to effect use of a vessel by sale, where they were being impeded by a minority "no matter how small that minority or unreasonable its exactions." *Tunno* v. *The Betsina*.

In sum, the foregoing cases illustrate doubt and dissension as to whether the federal jurisdiction extends to a partition action at all, except where the dispute is between owners of equal shares. If such jurisdiction or power exists in the abstract, it has not been exercised by the Federal Courts. Nor has the possible existence of such jurisdiction ever been held by Federal Courts to exclude the concurrent jurisdiction of state courts over partition actions. It is submitted, on principle, that where the very existence

of the admiralty jurisdiction is doubtful, the doubtful jurisdiction should scarcely be held exclusive.

II.

IF THE ADMIRALTY COURT HAS JURISDICTION OVER A PARTITION ACTION IN THE CIRCUMSTANCES OF THE CASE AT BAR, SUCH JURISDICTION IS NOT EXCLUSIVE, AND THE JURISDICTION OF THE STATE COURTS IS CONCURRENT.

The petitioner contends (Brief, 21) that "an action to partition a vessel certificated under the maritime laws of the United States is an action *in rem* and therefore within the exclusive jurisdiction of the district courts of the United States sitting in admiralty."

We say that it is not.

The concurrent jurisdiction of the state courts is preserved by Tit. 28 U. S. C. Sec. 1333 to suitors with respect to "all other remedies to which they are otherwise entitled"—that is to say, all remedies which are not within the exclusive jurisdiction of admiralty. The remedy which is within the exclusive jurisdiction of admiralty is the action *in rem* to enforce a maritime lien. An action for partition is not such a remedy. It is a remedy only *quasi in rem*, and does not interfere with the admiralty jurisdiction. If suitors are entitled to it by the laws of the state, the remedy of partition is saved to them. This is such a case.

The cases supporting these statements are summarized below.

A. The Jurisdiction of Admiralty Is Exclusive Only With Respect to Actions in Rem to Enforce Maritime Liens, and Does Not Exclude the Jurisdiction of State Courts Over Actions in Personam and Quasi in Rem.

The effect of the old saving clause, with respect to demarcation of the fields of admiralty jurisdiction which are exclusive and those which are not, was adjudicated by a series of cases commencing with *Taylor* v. *Carryl*, 20 How. 583 (U. S. 1858). See *The Moses Taylor*, 4 Wall. 411 (U. S. 1867); *The Hine* v. *Trevor*, 4 Wall. 555 (U. S. 1867); *The*

Belfast, 7 Wall. 624 (U. S. 1869); *Leon* v. *Galceran*, 11 Wall. 185 (U. S. 1870); *American Steamboat Co.* v. *Chase*, 16 Wall. 522 (U. S. 1873); *The Glide*, 167 U. S. 606 (1897); *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638 (1900); *The Robert W. Parsons* (*Perry* v. *Haines*), 191 U. S. 17 (1903); *Rounds* v. *Cloverport Foundry and Machine Co.* 237 U. S. 303 (1915); *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (1924).

The composite result of these cases is clear: (1) admiralty has exclusive jurisdiction in one type of action only (in the absence of specific federal statute), viz., an *in rem* action to enforce a maritime lien; (2) the saving clause reserves to the states concurrent jurisdiction with admiralty over actions which are *in personam* or which are *quasi in rem;* thus (3) state statutes which purport to create maritime liens and to give their courts power to enforce such liens directly against a vessel are invalid, but (4) state statutes which give rise only to actions *quasi in rem*, as by foreign attachment or execution of *in personam* judgments, are valid.

In *Taylor* v. *Carryl*, 20 How. 583 (U. S. 1858), an attachment of a vessel under a state court's writ of foreign attachment was sustained as the basis of jurisdiction *quasi in rem*, as between the vessel's owners and creditors.

In the leading case of *The Moses Taylor*, 4 Wall. 411 (U. S. 1867), however, the Court denied jurisdiction to the state courts of California jurisdiction to foreclose a lien for breach of a contract of passenger carriage by proceedings *in rem* against a vessel. The Court made this distinction between admiralty actions *in rem* (forbidden to the state courts) and common law actions *quasi in rem* (sanctioned by the saving clause):

> "The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is it-

> self seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title, made under its decrees, validity against all the world. By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common-law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold."

In *The Hine v. Trevor*, 4 Wall. 555 (U. S. 1867), the Court denied jurisdiction to the Iowa courts to enforce a lien for collision damage in an *in rem* action, saying (p. 571):

> "But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. * * *the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. * * *
>
> "While the proceeding differs thus from a common-law remedy, it is also essentially different from what are in the west called suits by attachment, and in some of the older states foreign attachments. * * * This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to a sale in a common-law court of the state.
>
> "Such actions may, also, be maintained *in personam* against a defendant in the common-law courts, as the common law gives; all in consistence with the grant of admiralty powers in the 9th section of the judiciary act.

In *The Belfast*, 7 Wall. 624 (U. S. 1868), the Court reached a similar result with respect to an *in rem* action in a state court to enforce a maritime lien for breach of a contract of affreightment, but pointed out that the appellants

might have validly proceeded in the state courts in an *in personam* action, and validly seized the vessel under the state's process of foreign attachment, because (p. 545):

> "* * * nothing can finally be held under the attachment except the interest of the owners in the vessel, because the vessel is held under the attachment as the property of the defendants, and not as the offending thing, as in the case of a proceeding in rem to enforce a maritime lien."

In *Leon* v. *Galceran*, 11 Wall. 185 (U. S. 1870), which sustained the jurisdiction of a Louisiana court to seize a vessel by process of foreign attachment in an *in personam* action for mariners' wages, the Court said (p. 191):

> "Suitors, by virtue of the saving clause in the 9th section of the judiciary act conferring jurisdiction in admiralty upon the district courts, have the rights of a common-law remedy in all cases 'where the common law is competent to give it,' and the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property.
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> . . . . . .
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> P. 192:
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> "Even where a maritime lien arises, the injured party, if he sees fit, may waive his lien and proceed by a libel *in personam* in the admiralty or he may elect not to go into admiralty at all, and may resort to his common-law remedy, as the plaintiffs in these cases did, in the subordinate court. They brought their suits in the state court against the owner of the schooner, as they had a right to do, and having obtained judgment against the defendant, they might levy their executions upon any property belonging to him, not exempted from attachment and execution, which was situated in that jurisdiction."

In *American Steamboat Co.* v. *Chace*, 16 Wall. 522 (U. S. 1873), in sustaining a state court's judgment for damages for death occasioned in a maritime collision, which de-

pended on the effectiveness of a state survival statute, the Court said, speaking of the saving clause (at p. 534):

> "Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the admiralty, if a maritime lien arises, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common law remedy in the state courts, or in the circuit courts of the United States if he can make proper parties to give the circuit court jurisdiction of his case."

In *The Glide*, 167 U. S. 606 (1897), jurisdiction was denied to Massachusetts to enforce, by an *in rem* action, a maritime lien given by state statutes for repairs to a vessel in her home port; but again the Court pointed out that an *in personam* action accompanied by a seizure of the vessel under process of foreign attachment would have been valid, quoting *Johnson* v. *Chicago & P. Elev. Co.* 119 U. S. 388, 397 (1886), (*infra*).

In *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638 (1900), in sustaining an Illinois state court's decree enforcing a lien for towage, the Court said (p. 648):

> "The true distinction between such proceedings as are and such as are not invasions of the exclusive admiralty jurisdiction is this: If the cause of action be one cognizable in admiralty, *and* the suit be *in rem* against the thing itself, though a monition be also issued to the owner, the proceeding is essentially one in admiralty. If, upon the other hand, the cause of action be not one of which a court of admiralty has jurisdiction, *or* if the suit be *in personam* against an individual defendant, with an auxiliary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law and within the saving

clause of the statute (§ 563) of a common law remedy. The suit in this case being one in equity to enforce a common law remedy, the state courts were correct in assuming jurisdiction."

As to whether the old language, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it", included suits in equity, the Court said, speaking of the suit before it (p. 644):

> "It was certainly not a common-law action, but a suit in equity. But it will be noticed that the reservation is not of an *action* at common law, but of a common-law *remedy*; and a remedy does not necessarily imply an action . . .

(P. 647):

> "In the case under consideration the suit was clearly one *in personam* to enforce a common-law remedy. It was no more a suit *in rem* than the ordinary foreclosure of a mortgage."

In *The Robert W. Parsons* (*Perry* v. *Haines*), 191 U. S. 17 (1903), the Court, in denying jurisdiction to the state courts of New York to enforce a maritime lien for repairs to a canal boat by an *in rem* action, reviewed a number of the foregoing cases, and said (p. 37):

> "In all these cases the distinction is sharply drawn between a common-law action *in personam*, with a concurrent attachment against the goods and chattels of the defendant, subject, of course, to any existing liens, and a proceeding *in rem* against the vessel as the debtor or 'offending thing', which is the characteristic of a suit in admiralty. The same distinction is carefully preserved in the general admiralty rules prescribed by this court; rule 2d declaring that, in suits *in personam*, the mesne process may be 'by a warrant of arrest of the person of the defendant, with a clause therein that, if he cannot be found, to attach his goods and chattels to the amount sued for;' and rule 9, that in suits and proceedings *in rem* the process shall be by

warrant of arrest of the ship, goods, or other things to be arrested, with public notice to be given in the newspapers. The former is in strict analogy to a common-law proceeding, and is a concurrent remedy. The latter is a proceeding distinctively maritime, of which exclusive jurisdiction is given to the admiralty courts."

In *Rounds v. Cloverport Foundry & Machine Company*, 237 U. S. 303 (1915), in affirming a Kentucky judgment which sustained an attachment for a lien for repair of a vessel, and which directed that the vessel be sold to pay the debt, the Court said (at 306):

"Further, it is urged in support of the judgment that the proceeding was *in personam*, and not *in rem;* that the attachment and direction for sale were incidental to the suit against the owners and for the purpose of securing satisfaction of the personal judgment. Accordingly, it is said, the proceeding was within the scope of the 'common-law remedy' saved to suitors by the judiciary act. * * *

"As the last point is plainly well taken, it is unnecessary to go further. It is well settled that in an action *in personam* the state court has jurisdiction to issue an auxiliary attachment against the vessel; and, whether or not the contract in suit be deemed to be of a maritime nature, it cannot be said that the state court transcended its authority. The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant, and is judged and sentenced accordingly.' By virtue of dominion over the thing all persons interested in it are deemed to be parties to the suit; the decree binds all the world, and under it the property itself passes, and not merely the title or interest of a personal defendant. (Citing cases) Actions *in personam* with a concurrent attachment to afford security for the payment of a personal judgment are in a different category. (Citing cases) And this is so not only in the case of an attachment against the property of the defendant generally,

but also where it runs specifically against the vessel under a state statute providing for a lien, if it be found that the attachment was auxiliary to the remedy *in personam*. (Citing cases)

In *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (1924), the Court, holding that the provisions of a New York statute authorizing specific performance of arbitration agreements were available in the courts of New York to enforce an arbitration clause in a charter-party, said (p. 123):

"... The 'right of a common-law remedy,' so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (Citing cases) A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction. (Citing cases) But otherwise, the state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit.

P. 125:

"... *In no case has this court held void a state statute which neither modified the substantive maritime law, nor dealt with the remedies enforceable in admiralty.*" (Emphasis added)

The state court has even been held to have true *in rem* jurisdiction (to condemn illegally used fish nets) in *C. J. Hendry Co.* v. *Moore*, 318 U.S. 133 (1943), on the ground that this jurisdiction rested in the Exchequer Court and was hence saved as a common-law remedy. Mr. Justice

Black dissented in that case on the ground that to allow a state court to enforce a true *in rem* right would give it power (at p. 154) "to give permanent halt to any portion of the maritime trade and commerce of the nation by bringing in rem proceedings against ships." Our case does not involve that remedy nor imply that result.

B. An Action for Partition is Not in Rem in the Admiralty Sense. It is in Personam and Quasi in Rem. Within the Concurrent Jurisdiction of the State Courts.

The proceeding *in rem* which admiralty jealously guards and over which it asserts exclusive jurisdiction is tied to, and correlative with, the maritime lien.

In *The Rock Island Bridge*, 6 Wall. 213 (U. S. 1867), the court, in holding that there was no jurisdiction in admiralty of an attempted *in rem* libel against a bridge for damage sustained by a vessel colliding with it, said, speaking of the maritime lien (at p. 215):

> "• • • The only object of the proceeding *in rem*, is to make this right, where it exists, available—to carry it into effect. It subserves no other purpose.
>
> "The lien and the proceeding *in rem* are, therefore, correlative———where one exists, the other can be taken, and not otherwise. Such is the language of the privy council in the decision of the case of *The Bold Buccleugh*, 7 Moore, P. C. 284. 'A maritime lien' says that court, 'is the foundation of the proceeding *in rem*, a process to make perfect a right, inchoate from the moment the lien attaches; and whilst it must be admitted that where such lien exists a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process'."

See also, *The Dutchess*, 15 F. 2d 198 (1926).

But actions for partition are not of this kind. They are not *in rem* in the admiralty sense, but are *quasi in rem*. They have been historically bracketed with foreclosures of mortgages, executions of judgments, attachments to enforce common law liens, all affecting only the interests of the parties.

The distinction between true actions *in rem*, i. e., those to enforce maritime liens, and the common-law remedies "loosely termed proceedings in rem", was made in *The Yankee Blade*, 19 How. 82 (U. S. 1857), as follows (p. 89):

> "The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a 'jus in re,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and devested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings in rem, are evidently not within the category.

In *Pennoyer v. Neff*, 95 U. S. 714, (1878), Justice Field said (at p. 734) that:

> "... in a strict sense, a proceeding in rem is one taken taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by *attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien.* So far as they affect property in the State, they are substantially proceedings in rem in the broader sense which we have mentioned." (Emphasis added.)

In *Freeman* v. *Alderson*, 119 U. S. 185 (1886), the Court characterized an action for the partition of real property as an action *quasi in rem*, in the following language:

(p. 187)

"There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant, to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties."

(p. 190)

"Such action, though dealing entirely with the realty, is not an action *in rem* in the strict sense of the term; it is an action against the parties named, and, though the recovery and partition of real estate are sought, that does not change its character as a personal action; the judgment therein binds only the parties in their relation to the property."

In *Tucci* v. *Arbusto*, 56 F. 2d 666 (S.D. N.Y. 1931), the district court, on its own motion, refused to sign a default decree in an action in admiralty *in rem* for the partition of a vessel, and directed that process *in personam* issue, saying (p. 666):

"The difficulty with the situation here is that, whilst the marshal has already arrested the vessel on a process in rem, there has not been any process in personam

issued, and such a process must issue against the co-owner defendant Arbusto and he must have defaulted thereon as a prerequisite to my right to enter a default decree in this matter." (Citing cases)

Benedict (Admiralty, 6th Ed. 1940, Sec. 74, p. 159) cites the *Tucci* case for the proposition that:

"A decree of partition or licitation cannot issue merely upon a libel *in rem;* it is essential that the co-owner be also sued and served *in personam.*"

C. The Partition Statute of California Has Been Construed and Applied by the Supreme Court of California in the Case at Bar as in Personam and Quasi in Rem.

The holding of the State Supreme Court challenged by the petitioner was (Opinion, R. 32):

"Decisional law that admiralty has jurisdiction in partition by the sale of a vessel does not necessarily determine that the State does not have concurrent jurisdiction when the remedy therefor exists. On the contrary there is authority to the effect that the state has concurrent jurisdiction in equity to partition a vessel by sale when there is disagreement among the co-owners as to how the ship should be employed. The leading cases (Andrews v. Betts, 1876, 15 N.Y. Sup. Ct. Rep. (8 Hun.) 322), and others following it were treated in Fischer v. Carey, supra, 173 Cal. at p. 192 et seq. In Andrews v. Betts unequal owners sought partition and sale of a propellor operated under acts of Congress on the Hudson River. It was decided that concurrent state jurisdiction existed under state equity powers (as distinct from any common law remedy) to decree partition and sale. That case was rejected in Fischer v. Carey because the common law provided no such remedy and partitions in equity was therefore not a remedy reserved to suitors by the federal statute.

"The answer here is resolved by the 1949 amendment to the Judicial Code saving to suitors all other remedies to which they are 'otherwise entitled.' The amendment clarifies the intent to preserve the state concurrent jurisdiction where a remedy is provided under state law which is available to the plaintiffs.

* * * * *

"... It follows that the state court is competent to decree ownership interests, sale of a vessel, and distribution of the proceeds, at least where the granting of the relief does not conflict with federal maritime policy that the majority owners determine the use and employment of the vessel. Therefore the respondent court has power to proceed on the petition of the majority owners here."

The California statute here in question does not purport to create a maritime lien, with which the true admiralty *in rem* action is exclusively linked. It is a general statute, applicable to partition real estate, as well as personalty. In the case at bar, the complaint prays only that the "vessel be sold and the proceeds of said sale partitioned between the parties according to their respective interests in the vessel." (R. 2) No *in rem* determination of rights good against the world is asked or suggested. Jurisdiction over the defendant (petitioner) was obtained by personal service (R. 14) and appearance (R. 2). The defendant has answered (R. 3). There has not yet been any attachment of the vessel. No liens are involved (R. 1, 29). The jurisdiction of the California court is *in personam*, and, when the sale is ordered, will, like any execution, operate *quasi in rem* upon the vessel only to the extent of rights of the owners among themselves. Obviously it cannot, and does not purport to, cut off maritime liens.

In *Taylor* v. *Carryl*, 20 How. 583, 598 (U. S. 1858), the Court, after quoting 3 Story's Commentaries, sec. 1066, Note 3, said:

"In conformity with this opinion, the habit of courts of common law has been to deal with ships as personal property, subject, in the main, like other personal property, to municipal authority, and liable to their remedial process of attachment and execution, *and the titles to them*, or contracts and torts relating to them, are cognizable in those courts." (Emphasis added.)

Petitioner relies upon *Cline* v. *Price*, 39 Wash. 2d 816 (1951), in which minority owners of a vessel brought an action to compel the majority owners to sell the vessel. The court held that exclusive jurisdiction was in admiralty, and declined relief.

Cline v. *Price* was criticized in 27 Washington L. Rev. 176, 190 (1952) as follows:

> "The Washington court in *Cline* v. *Price* predicated its holding that the lower court had no jurisdiction of the partition action upon the following syllogism: Admiralty has exclusive jurisdiction over action *in rem*, a suit for partition is essentially a proceeding *in rem*, therefore a state court is without jurisdiction of a suit for partition of a vessel. The validity of the minor premise is open to some doubt, and that of the major premise even more so if it is applied uncritically.
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> • • • • •
>
> "It is submitted that when the Supreme Court has said that actions *in rem* are within the exclusive jurisdiction of admiralty and not within the saving clause, it was talking solely about *in rem* actions, in the strict sense of the term, against a vessel to foreclose a maritime lien. The court has never denied state court jurisdiction in any other kind of case, and the language of the cases, so far as suits between private litigants are concerned, is restricted in this connection to actions *in rem* to enforce a maritime lien.
>
> • • • • •
>
> "The suit for partition was not one in which the vessel was 'itself seized and impleaded as the defendant, (to be) judged and sentenced accordingly.' In *Knapp, Stout & Co.* v. *McCaffrey*, a state court equity suit to foreclose a possessory lien on a raft of logs for towage, the Supreme Court held it incumbent on the defendant, who pleaded jurisdiction exclusively in admiralty, to show that the proceeding taken was a suit *in rem* as construed in *The Moses Taylor*, *The Hine* v. *Trevor*, *The Belfast*, and *The Glide*—all cases involving a suit directly against the vessel to appropriate her, as the offending *res*, for the indemnification of the plaintiff. The action before it, said the court, was 'no

more a suit *in rem* than the ordinary foreclosure of a mortgage.' Since the same court in *Pennoyer* v. *Neff*, and *Freeman* v. *Alderson* linked actions to foreclose a mortgage and actions for partition as actions *in rem* only in the broad (or *quasi*) sense of the term, as distinguished from the true action *in rem* as defined in the admiralty cases, it should seem that the action for partition of a vessel in a state court is a remedy to which the suitor 'is otherwise entitled,' as not infringing upon the exclusive jurisdiction of admiralty.

"The Washington court in *Cline* v. *Price* could—and it is submitted, should—have taken jurisdiction over plaintiff's lawsuit. The ultimate result of denying plaintiffs the relief sought may well be correct. As pointed out in the *Cline* case, as a matter of substantive law admiralty will not decree a partition of a vessel at the behest of minority owners who object to the employment to which the vessel is put by the majority. As a matter of uniformity in the maritime law, binding upon both state and federal forums, a state court should doubtless apply this rule. But this is a matter of substantive law, not jurisdiction. *Cline* v. *Price* has not clarified the scope of jurisdiction in the admiralty."

In the case at bar, the relief sought is not in derogation of any substantive rule of the admiralty law, but in accord with one of its established principles: that the majority shall control the use and disposition of the vessel. Here, the plaintiffs are the majority in interest; in *Cline* v. *Price* they were the minority. Whether the Washington court was right or wrong in refusing jurisdiction, the California court was right in accepting it.

III.

THE APPLICATION OF THE CALIFORNIA PARTITION STATUTE BY THE COURTS OF THAT STATE, IN THE CIRCUMSTANCES OF THE CASE AT BAR, WILL NOT INTERFERE WITH THE PROPER UNIFORMITY OF THE MARITIME LAW.

Petitioner urges (Brief, p. 23, et seq.) that the assumption of jurisdiction by the Superior Court of California would disturb the proper harmony and uniformity of the mari-

time law. The argument seems to be that admiralty has jurisdiction of a partition action of either majority or minority owners (Brief, p. 24), but as a rule of substantive law will not exercise that jurisdiction except in a suit between equal owners (Brief, p. 25), and that in any event some disagreement would have to be proved in admiralty but not under the California statute.

This is another way of saying that petitioner could and would block a partition suit in admiralty, if we were forced to sue there, and that the eight owners of 85 per cent of the vessel, who want to liquidate their investment, would have to bow to the wishes of the single owner of 15 per cent who wants to keep them locked in business with him, or else buy him out on his terms. The salutary purpose of the California statute is to free co-tenants from exactly that situation. As applied to the tuna fleet, where petitioner says it is a matter of common practice that vessels be owned in co-ownership (Brief, p. 28), the California statute is particularly desirable, to encourage and facilitate maritime investments which would never be made if they were known to be frozen. Nor is there any reason to require proof of disagreement. Co-tenants may agree with one another in every respect save their relative need to recover the cash invested in their common venture. Moreover, petitioner's answer in this case (R. 3), like his brief, makes no claim that he has any reason whatever for objecting to the sale, which he intends to offer either in the State court when this case is tried there, or which he would offer in the admiralty court if we were forced to sue there. If he has a reason why the sale should not be made, under the safeguards for all owners provided by the California statute, he has not said so, either in the State court or here.

The cases petitioner cites in support of the alleged substantive rule, *The Brig Seneca*, 21 Fed. Cas. 1081, No. 12,670 (C.C.Pa. 1828), *The Ocean Belle*, 18 Fed. Cas. 524, No. 10,402 (S.D. N.Y. 1872), *Fischer* v. *Carey*, 173 Cal. 185 (1916), *Cline* v. *Price*, 39 Wash. 2d 816 (1951), were all

brought by minority owners with the exception of *The Brig Seneca*, where the court decreed a sale among half owners. The refusal of these courts to recognize a minority's right to demand a sale scarcely establishes a substantive rule that like relief should be denied the majority.

The denial of the majority's desire to sell would seem to conflict squarely with the admiralty rule that the majority may conduct all business pertaining to the vessel. *Steamboat Orleans* v. *Phoebus*, 11 Pet. 175, (U.S. 1837); *Tunno* v. *The Betsina*, 24 Fed. Cas. 316, No. 14,236 (D.C. S.C. 1857).

In *Jordine* v. *Walling*, 185 F. 2d 662, 666 (1950), the Third Circuit Court of Appeals said:

> "... The latter clause [the saving clause] has been held to authorize any competent court which has jurisdiction of the parties to entertain a civil action at law for the enforcement of a right conferred by the maritime law where the right is of such nature that adequate relief may be given in such an action. (Citing cases.)

The remedy of partitions, where it conflicts with no other policy, has long been favored by the law:

> "Partition is a right much favored, upon the ground that it not only secures peace, but promotes industry and enterprise. The rule of the civil as of the common law that no one should be compelled to hold property in common with another grew out of a purpose to prevent strife and disagreement. Additional reasons are found, however, in the more modern policy of facilitating the transmission of titles, and in the inconvenience of joint holding. Partition proceedings enable those who own property as joint tenants, coparceners, or tenants in common, to put an end to the tenancy so as to vest in each a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and after partition, each has the right to enjoy his estate without supervision, let, or hindrance from the other. Unless this can be accom-

> plished, then the joint estate ought to be sold, and the proceeds divided. Courts should be and are, adverse to any rule which will compel unwilling persons to use their property in common." 40 Am. Jur. § 4, p. 5.

When the "Liberty" is sold and her proceeds distributed pro rata among these nine men, petitioner included, the new owner will presumably put the vessel into service, and if there is any effect on commerce, it will be a beneficial one.

The "Liberty" could have been attached under process of the state court in an *in personam* action, and sold under execution of the state court's judgment. *Taylor* v. *Carryl*, 20 How. 583 (U.S. 1857); *Leon* v. *Galceran*, 11 Wall. 185 (U.S. 1870); *Johnson* v. *Chicago & P. Elev. Co.*, 119 U. S. 388 (1886); *Knapp, Stout & Co.* v. *McCaffrey*, 177 U. S. 638 (1900). Even under mesne process, and before final judgment, it could have been ordered sold to avoid deterioration, and the proceeds impounded for distribution by the state court. *Taylor* v. *Carryl, supra.*

Johnson v. *Chicago & P. Elev. Co.*, 119 U. S. 388, 399 (1886), referring to non-maritime liens enforced against vessels by suits *in personam*, said:

> ". . . Liens under state statutes, enforceable by attachment, in suits *in personam*, are of every-day occurrence, and may even extend to liens on vessels when the proceedings to enforce them do not amount to admiralty proceedings *in rem*, or otherwise conflict with the Constitution of the United States. There is no more valid objection to the attachment proceeding to enforce the lien in a suit *in personam*, by holding the vessel by mesne process to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on the execution. Both are incidents of a common-law remedy which a court of common law is competent to give." (Quoted with approval in *The Glide*, 167 U.S. 606, 621 (1897).)

There is no reason, on principle, why a judicial sale initiated by a vessel's majority owners instead of strangers should occasion any greater invasion of admiralty jurisdiction.

If the nine owners had incorporated, the corporation, by a vote of a majority of its stock (here 85 per cent), could have sold the vessel; or the corporation could have been dissolved and its property, the vessel, sold, all without involving the admiralty jurisdiction at all. Here the state statute provides a like remedy for investors who have proceeded as tenants in common instead of by incorporating.

This is a "home port" controversy, a difference of opinion among neighbors, even more remote from its effect on maritime commerce than the question of whether a lien shall arise for home-port materials or repairs. It has been ruled that:

> "... so long as Congress does not enterpose [sic] to regulate the subject, the rights of material men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation." *The Lottawanna*, 21 Wall. 558, 580 (U.S. 1875), quoted with approval in *The Glide*, 167 U.S. 606, 620 (1897).

It would seem that if the following are "purely local matters" which should or may be left to the states' legal processes—

(1) specific performance of a contract of sale of a vessel, *The Guayaquil*, 29 F. Supp. 578 (E.D. N.Y. 1939);

(2) specific performance of a maritime contract containing an arbitration agreement, *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (1924);

(3) limitation of workman's recovery for injuries sustained, by statute affecting a maritime right, *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469 (1922);

(4) reformation of a maritime contract, *Koninklijke Nederlandsche Stoomboot Maatschappij* v. *Yglesias*, 37 F. 2d 103 (1930);

(5) suits to enforce or dissolve a contract of partnership, even though the business of the partnership is maritime,

The Yankee Blade, 19 How. 82 (U.S. 1857); *The Red Wing*, 10 F. 2d 389 (S.D. Cal. 1925)—then certainly an action for partition and sale, which is in the nature of a family squabble, should be equally within the states' jurisdiction. A petition to dissolve the joint ownership of a vessel is not unlike a dispute arising from a marine partnership agreement, over which state courts have long exercised jurisdiction.

It has been suggested that where possible conflict between local and admiralty law may occur, uniformity may be achieved and the application of state law continued by utilizing the principles developed in connection with the commerce clause of the Constitution. Note, 17 *Geo. Wash. Law Rev.*, 353 (1949). The national interest in the field of maritime activity is analogous to that in the field of commerce. Commercial necessities, therefore, should determine the extent to which uniformity is required in maritime law. This was the principle announced by Mr. Justice McReynolds in the *Rohde* case, *supra*. Application of the law of California in this action would not interfere with the harmony and uniformity of maritime law in its international or interstate aspects. Trade between the states and foreign nations would be in no way impeded or obstructed. No excessive burden would be placed on those who own and manage commercial vessels. On the contrary, in view of the policy reasons favoring an easy severance of common ownership interests, the business of carrying on trade by watercraft would be benefited by the simple procedure for partition provided by California law.

We say that either admiralty has no jurisdiction of a partition action among owners of unequal shares, or if it does have such jurisdiction, it is not exclusive but concurrent with that of the state; that the substantive rule in admiralty is that the majority shall control the use and disposition of the vessel; and the enforcement of a like rule by a state court in decreeing a sale on suit of the majority owners is consistent with, not in derogation of, that substantive rule of admiralty.

CONCLUSION

For the reasons stated, we respectfully submit that the decision of the Supreme Court of the State of California should be affirmed.

Respectfully submitted,

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